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No. 240

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In the Supreme Court of the United States

OCTOBER TERM, 1943

BERTHA A. OWENS, Executrix of the Estate
of Leyle F. Owens, deceased,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,

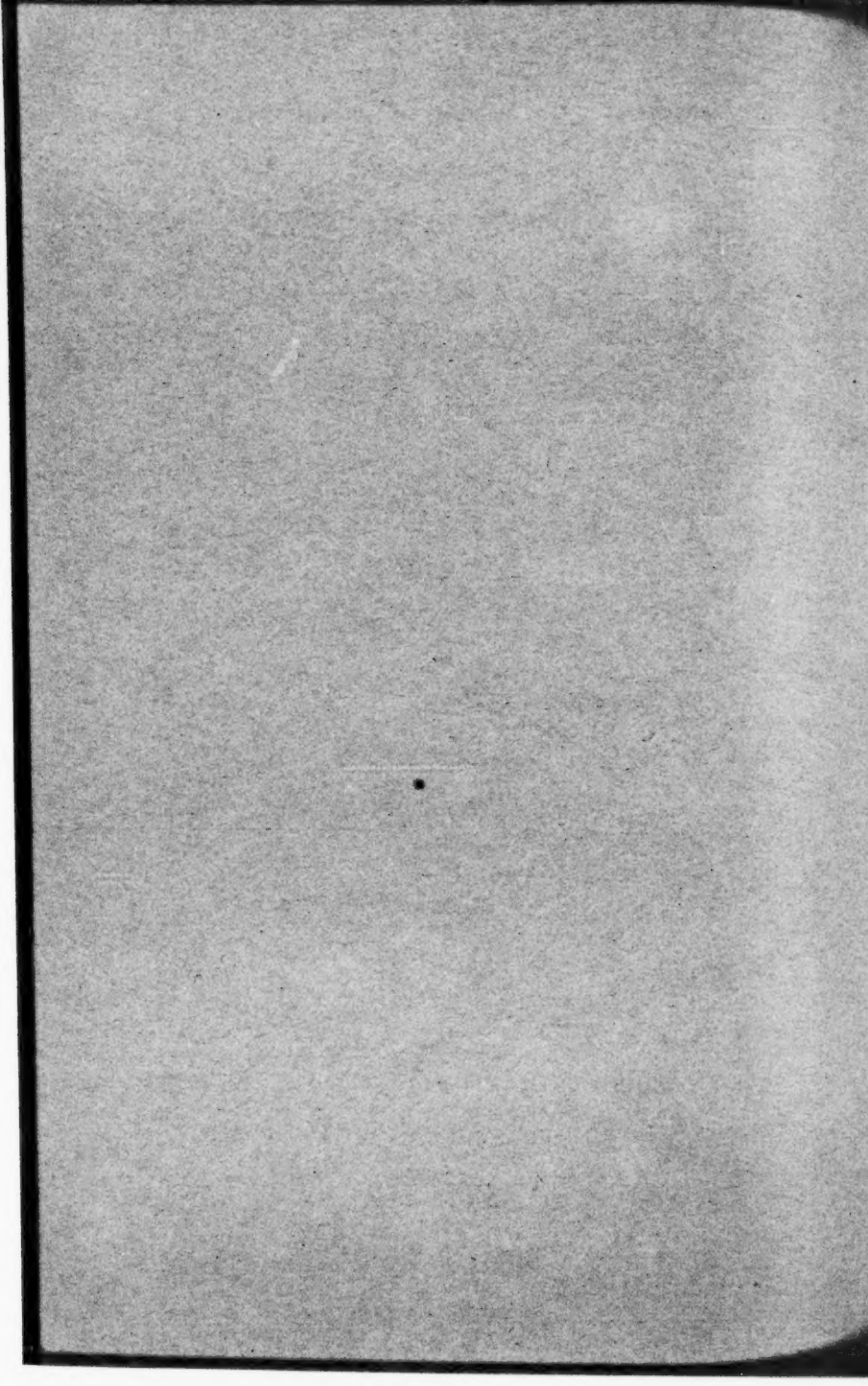
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the United States Circuit Court of Appeals
for the Ninth Circuit.

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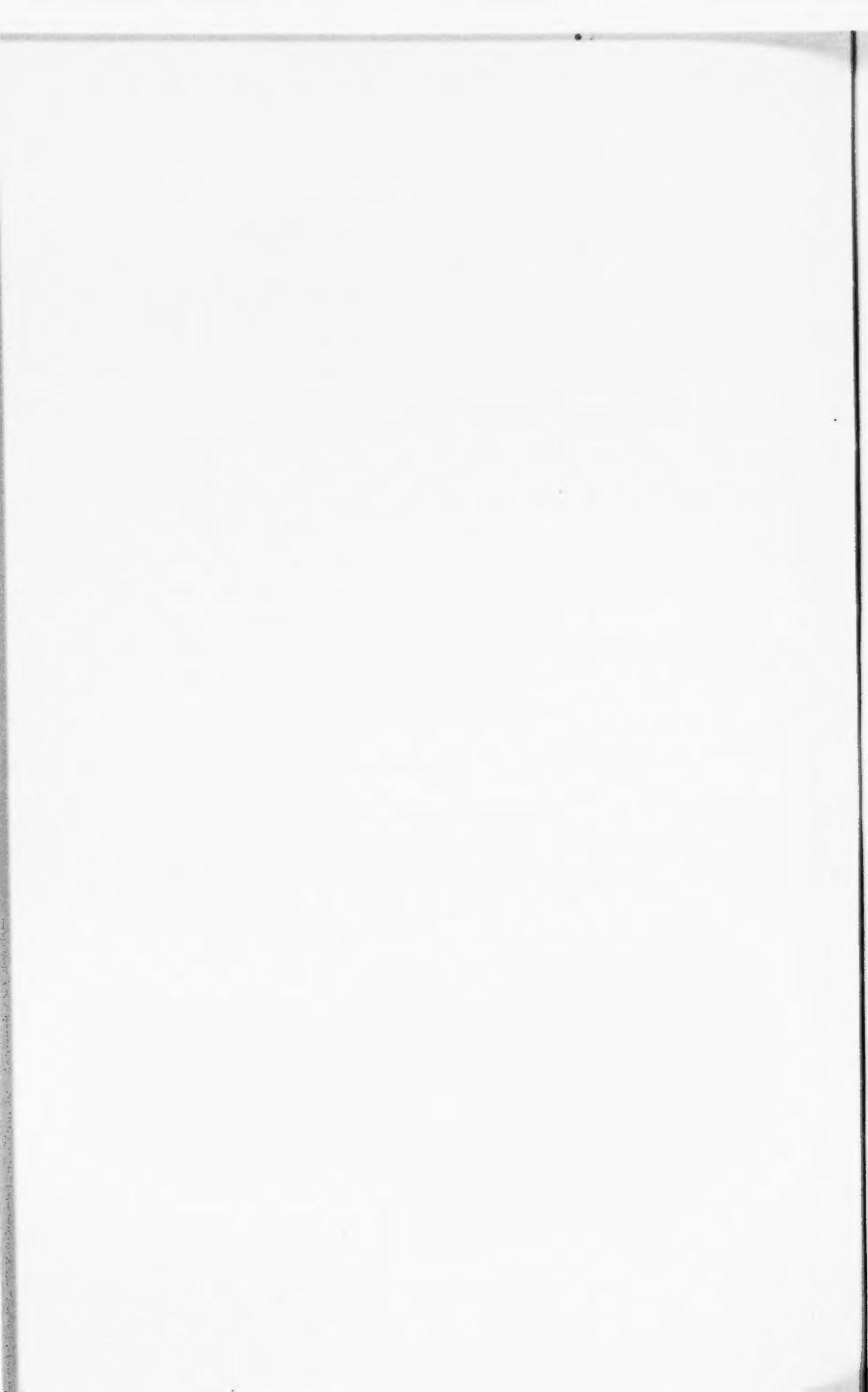
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**In the Supreme Court
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OCTOBER TERM, 1943

BERTHA A. OWENS, Executrix of the Estate
of Leyle F. Owens, deceased,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT THEREOF.**

To the United States Circuit Court of Appeals
for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

Your petitioner, Bertha A. Owens, Executrix of
the Estate of Leyle F. Owens, deceased, respectfully
shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was commenced by petitioner under the Federal Employers' Liability Act in the District Court of the United States for the Eastern District of Washington to recover damages for pain, suffering and death of her husband, Leyle F. Owens, an employe of the Union Pacific Railroad Company as an engine foreman.

While decedent was so employed on February 16, 1939, he was engaged in participating in switching cars in defendant's yards at Spokane, Washington. A switch engine was attached to two cars and same were kicked or pushed on to him by defendant's enginemen and other employes while their view of him was obstructed by such cars and a curve in the track, without receiving any signal from him or giving him any warning whatsoever as he was crossing the track in a northerly direction in front of the cars after throwing a switch, apparently to reach a point where he could give a signal that could be seen for the movement of the engine and cars, as was the custom and practice (R. 108-114; 93; 89-92; 95-99). When the cars were kicked on to decedent he was knocked down and run over by them, inflicting mortal injuries from which he died about 21½ hours later.

It is admitted by defendant that the following Rule 30 contained in its Book of Rules was in full

force and effect :

“Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snow-sheds.”

The grounds of negligence alleged in plaintiff's complaint are fully set forth as subdivisions (a) to (e) inclusive (R. 4, 7, 8) among which is the following:

“(d) That defendant and defendant's enginemmen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, before moving said engine and cars or when same were about to move.”

Evidence of a number of witnesses, principally defendant's employes responsible for the switching operation, was offered and received to establish that at the time the cars were being switched there was a practice and custom in the yards to look out for each other, including plaintiff's decedent, and ascertain his whereabouts before moving the cars, and that no one, including yardman Koefod, who gave a kick signal to the engineer, ascertained where decedent was before giving such signal. Evidence was further received that it was the practice and custom to receive a hand or other signal from Mr. Owens, who was in charge of the crew, before signaling defendant's engineer to kick or move the cars (R. 108-114; 92-93; 89-92; 95-99). Undisputed evidence also showed that no signal was received from Mr. Owens at the time,

and that he was given no warning of the movement that defendant's enginemen, who had complete control of the operation of the engine and the ringing of the bell (R. 199-200) failed to ring the same before moving the engine and cars or when the same were about to move (R. 138) in violation of the aforesaid Rule 30.

Respondent in its pleadings admit decedent's employment, that he was killed in the course thereof in switching cars, and that the same contained interstate commerce, denied negligence, and further alleged and claimed that Mr. Owens' death was caused by his own negligence in stepping in front of the moving cars.

This action was tried under the Federal Employers' Liability Act in accordance with its provisions so far as applicable. Sections 51-59 as amended, Chapter 2, Title 45, U.S.C.A.

Judgment entered for \$10,000.00 for petitioner on April 23, 1941 (R. 247-248).

Respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit which by its judgment dated August 5, 1942, reversed plaintiff's cause (Court's opinion R. 268; 129 Fed. (2d) 1013).

Writ of Certiorari granted January 18, 1943. 317 U. S. 623; 87 L. Ed. 505.

On June 14, 1943, the Supreme Court reversed the judgment of the Circuit Court of Appeals and held

that plaintiff's decedent as a matter of law did not assume the risk of his injuries resulting in his death, and remanded the cause to said Circuit Court of Appeals for further proceedings in conformity with its opinion. 319 U.S. 715; 87 L. Ed. 1683.

The Court of Appeals took the case under advisement and on April 14, 1944, rendered its opinion wherein it treated the opinion of the Supreme Court as requiring it to pass upon other alleged assignments of error of respondent in its appeal, hereinafter referred to, and once more reversed petitioner's judgment and remanded the cause to the trial court with instructions to apply the law in accordance with the opinion of the Supreme Court and its opinion. 142 Fed. (2d) 145 (Adv. Sheets No. 2).

Jurisdiction of this Court

The statute upon which your petitioner relies to invoke the jurisdiction of this Court is Title 28, Section 347 U.S.C.A. (Judicial Code Section 240) of the United States. Your petitioner claims that her rights under the Federal Employers' Liability Act have been denied by the United States Circuit Court of Appeals.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals erred in holding that there was custom evidence proffered by respond-

ent as to the nonuse of Rule 30 in yard switching operations, on the issue of negligence against respondent.

2. The Circuit Court of Appeals erred in its construction of respondent's proffered evidence as to the nonuse of Rule 30 in switching operations and in its holding that the trial court failed to admit same, and such action constituted reversible error.

3. The Circuit Court of Appeals erred in holding that Rule 51 of the Rules of Civil Procedure did not preclude respondent due to its lack of exceptions to the court's instructions and the failure of the court to give respondent's requested instruction No. 17 (R. 236), from raising the question of the application of Rule 30 to its yards.

4. The Circuit Court of Appeals erred in holding that reversible error was committed by the trial court in instructing the jury that the non-observance of Rule 30 as to the ringing of the bell in the instant circumstances was negligence per se.

5. The decision of the Circuit Court of Appeals is in error in that the same is in conflict with the decisions of this court and the Fifth Circuit and other Circuit Courts of Appeals.

6. The Circuit Court of Appeals erred in setting aside the verdict of the jury on apparent pure technicalities and casting upon petitioner the burden of a retrial of her cause which was once decided by a jury.

PRAYER FOR WRIT

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9940 Union Pacific Railroad Company, a corporation, Appellant, vs. Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, deceased, Appellee; and that said judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court and the judgment of the District Court of the United States for the Eastern District of Washington affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BERTHA A. OWENS, Executrix of
the Estate of Leyle F. Owens, De-
ceased, Petitioner.

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